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Supreme Court of The United States

October Term, 1961

No. 131

ROBERT E. LEE & CO., INC., AND DIXIE CONSTRUCTION COMPANY OF GEORGIA, INC.,

Petitioners,

versus

NATHAN THOMAS VEATCH AND THOMAS B. ROBINSON, doing business as BLACK & VEATCH,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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Supreme Court of The United States

October Term, 1961

No. 986

ROBERT E. LEE & CO., INC., AND DIXIE CONSTRUCTION COMPANY OF GEORGIA, INC.,

Petitioners,

versus

NATHAN THOMAS VEATCH AND THOMAS B. ROBINSON, doing business as BLACK & VEATCH,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Western District of South Carolina is reported at 195 Federal Supplement 528. The opinion of the United States Court of Appeals for the Fourth Circuit dated December 8, 1961 and its Order dated February 24, 1962 denying the Petition for Rehearing are not yet reported.

QUESTIONS PRESENTED

The Respondents believe that for purposes of both clarity and simplicity, the "Questions Presented" should be stated as follows:

1. Do the Provisions of 28 U.S.C.A. 1391 (c) Defining the Residence of a Corporation for Venue Purposes Apply Only

to Corporations as Defendants or Do these Provisions also Apply to Corporations As Plaintiffs?

2. Was Venue Properly Laid in the Western District of South Carolina Under Section 1391 of the General Venue Statute?

3. Has there been any Waiver of Venue in this case by the Respondents?

STATEMENT OF THE CASE

The Petitioners, Robert E. Lee and Company, Inc., a corporation organized under the laws of the State of South Carolina and having its principal place of business in Manning, South Carolina in the Eastern District of South Carolina, and Dixie Construction Company of Georgia, Inc., a corporation organized under the laws of the State of Georgia with its principal place of business in Savannah, Georgia, originally instituted this action in the United States District Court for the Western District of South Carolina, Greenville Division. The Respondents are Nathan Thomas Veatch and Thomas B. Robinson, both residing in Kansas City in the State of Missouri, where the principal place of business is located for their partnership of Black and Veatch. The Complaint in this action, as finally amended, alleged that each corporate Plaintiff ". . . was, at all times hereinafter mentioned, and is, engaged in the general construction business, being licensed to do business and doing business in Greenville County in the Western District of South Carolina." The Complaint alleged that none of the Respondents are citizens of the State of South Carolina, that the Defendants ". . . were and are individuals doing business as an unincorporated association or partnership under the name and style of Black and Veatch, 1500 Meadow Lake Parkway, Kansas City, Missouri."

The Respondents thereafter moved to dismiss the action because of lack of venue in the Western District of South Carolina and the motion was heard before Honorable C. C. Wyche, United States District Judge for the Western District of South Carolina, who issued an Order refusing the Respondents' motion to dismiss but granting leave to the Respondents to make

application to appeal an interlocutory decree as provided for under 28 U.S.C.A. Section 1292 (b). This application was duly made and by an Order dated April 14, 1961, permission was granted to the Respondents to take an interlocutory appeal from the ruling of said District Court. Briefs were filed by both sides, the case argued before the United States Court of Appeals for the Fourth Circuit, and by its Opinion, dated December 8, 1961, the Fourth Circuit Court of Appeals reversed the decision of the District Judge and determined that 28 U.S.C.A. 1391 (c) applied only to corporate defendants and not to corporate plaintiffs, that venue was not properly laid in the United States District Court for the Western District of South Carolina and that the motion to dismiss should have been granted.

The Petitioners subsequently filed a Petition for Rehearing of the appeal, based not upon any quarrel or attack upon the correct and well considered decision of the Court, but contending that venue had been properly laid under 28 U.S.C.A. Section 1391 (a) and that this allegation had not been considered on appeal, but if considered would have resulted in a different decision. The Respondents, pursuant to the directions of the Court, filed their brief in answer to the Petition, and by Order dated February 24, 1962, the Petition for Rehearing was denied.

ARGUMENT

I

Do the Provisions of 28 U.S.C.A. 1391 (c) Defining the Residence of a Corporation for Venue Purposes Apply Only to Corporations as Defendants or do these Provisions also Apply to Corporations as Plaintiffs?

The Respondents are of the view that this question, which is the only real issue involved in the case at this state, has been correctly determined by the United States Court of Appeals for the Fourth Circuit and that under said decision there is no necessity for a review by this Court as alleged in the

Petition for Certiorari. While it is quite true that the district courts throughout the country as well as the text writers are not in agreement on the effect of this Revision of the Judicial Code, the Respondents submit that Chief Judge Sobeloff has by his decision in this case correctly determined that 28 U.S.C.A. Section 1391 (c) was intended by Congress only to alter the pre-existing general law governing venue to the extent of permitting suit to be instituted *against* corporations in any jurisdiction wherein they are conducting business activities. There are no conflicting decisions on the Court of Appeals level which necessitate a review by this High Court of Chief Judge Sobeloff's manifestly correct decision.

Prior to the adoption in 1948 of Section 1391 (c) the Supreme Court in an unbroken line of decisions had declared "that the 'residence' of a corporation, within the meaning of the venue statutes, is only in 'the State and district in which it has been incorporated'." *Suttle Administratrix v. Reich Bros. Construction Co.*, 333 U.S. 163, 166, 68 S.Ct. 487, 489, 92 L.Ed. 614 (1948). An exception to this general immunity of a corporation from suit elsewhere than its place of incorporation was permitted under *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 168 (1939). Under this case, suit was permitted against a corporation in a judicial district in which it was licensed to do business on the theory that by obtaining a license to do business in a state and appointing an agent for the service of process, the corporation waived any venue privilege it might have had not to be sued there. No effort was made there by the court to re-define the residence of a corporation for venue purposes.

It was in this setting that Congress in 1948 passed Section 1391 (c), which reads as follows:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

If the contention of the Petitioners be correct that Congress intended by this statute to change the pre-existing law so as

to provide that a corporation may institute suit against any defendant in any judicial district where it is engaged in business activities, then Congress could easily have manifested such intent by having the subsection read "a corporation may *sue or* be sued, etc."

It is a basic rule of construction that Congress, in revising and consolidating the laws, will not be inferred to have intended to change their effect in absence of clear expression of such intention. In order to give force to the Petitioners' contention it is necessary to read into the statute words which are not there. Nowhere in the revisers' notes or in the reports of the committee with respect to the 1948 revision and recodification of the Judicial Code, is there any expression of intention that Section 1391 (c) should apply to plaintiff corporations as well as to defendant corporations. As set forth by Chief Judge Sobeloff in his Opinion in this case:

> "No such purpose can be gathered from the legislative history, and having regard for the guidelines laid down by the Supreme Court for interpreting the Judicial Code, we think the proposition must fall. At most, the statute is ambiguous, and as stated by the Court in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1959), '*** "it will not be inferred that Congress, in revising and consolidating the laws intended to change their effect unless such intention is clearly expressed."' "

The history of venue in the Federal Courts reveals that the interpretation of Venue Statutes has been aimed at their restriction under diversity jurisdiction, with strict tests imposed and applied in the determination of the residence of the parties. Although Section 1391 (c) has relaxed the rule as to corporate defendants, the Courts are not justified in reading into the statutes words not contained therein and the Respondents believe that Chief Judge Sobeloff, after duly considering all authorities, has correctly answered the contentions of Petitioners. The decision of the Court of Appeals is in accord with a number of previous district court decisions on the subject, including the decision of Judge Switzer in *Chicago & North Western Ry. v. Davenport*, 94 F. Supp. 83

(S.D. Iowa (1950); Judge Kraft in *Albright & Friel, Inc. v. United States*, 142 F. Supp. 607 (E.D. Pa. 1956); and Judge Robinson in *Nebraska-Iowa Bridge Corp. v. United States*, 158 F. Supp. 196 (D. Neb. 1958). Compare *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F. 2d 508, 518 (2d Cir. 1960) (concurring opinion); *Lipp v. National Screen Service Corp.*, 95 F. Supp. 66, 69 (E.D. Pa. 1950); *United Merchants and Manufacturers v. United States*, 123 F. Supp. 435 (M.D. Ga. 1954).

II

Was Venue Properly Laid in the Western District of South Carolina Under Section 1391 *of the General Venue Statute?*

Prior to any discussion of this question on its merits, the Respondents invite the Court's attention that the Petitioners pointed out in their Petition for Rehearing that on argument of the motion to dismiss before the district judge, "The question was put to Judge Wyche under 1391 (c) and so it was considered by him." (Petition for Rehearing, p. 3). Only in the Petition for Rehearing, after the Petitioners had received an adverse ruling on the issue certified to the Court of Appeals for its review, did the Petitioners seek to change their course and contend that Section 1391 (c) applied to unincorporated associations as well as to corporations. After first pointing out that the issue was invoked by the Petitioners for the first time in the Petition for Rehearing to the Court of Appeals and there were not present circumstances which would justify an exception to the orderly procedures and processes provided for proceeding in Federal Courts, the Respondents proceeded to meet the issue head on and believe it was clearly shown that the newly asserted contentions of the Petitioners were completely unfounded and without merit.

28 U.S.C.A. Section 1391 (c) provides that a 'corporation' may be sued in any judicial district in which it is doing business and in order to apply this statute to any other type defendant it is once again necessary to read into the statute words which are not there. The Respondents submit that all parties should

concede that had Congress intended to extend that provision beyond the scope of corporations, it would certainly have made that intention known and could easily have done so by the mere addition of the words 'individuals', 'partnerships', 'unincorporated associations' or whatever else might have been the Congressional intent.

The dismissal of the Petition for Rehearing is attacked by the Petitioners under the authority of *Portsmouth Baseball Corp. v. Frick*, (S.D.N.Y. 1955) 132 F. Supp. 922, *American Airlines, Inc. v. Air Line Pilots Assn. Inter.*, (S.D.N.Y. 1958) 169 F. Supp. 777 and *R. & E. Dental Supply Co., Inc. v. Hitter Co., Inc.*, (S.D.N.Y. 1959) 185 F. Supp. 812. It will be noted that all three of these cases are from the Southern District of New York, thi being the only authority cited in support of the contention that an unincorporated association is treated the same as a corporation for venue purposes, and therefore, under Section 1391 (c) an unincorporated association may be sued in any judicial district where it is doing business. There are no other supporting decisions either on the District Court level or from the Courts of Appeal.

There is, however, authority to the contrary and the district judge writing the decision in the *Portsmouth Baseball Corp.* case, *supra*, the first of the three cited cases from the Southern District of New York, discussed these cases but refused to recognize them as controlling. The Respondents submit as governing the effect of Section 1391 on venue the only case from a Court of Appeals found, that being *Brotherhood of Locomotive Firemen and Engineers v. Graham*, 84 U. S. App. D. C. 67, 175 F. 2d 802 (1948). The *Graham* case was the first decision to take note of 28 U. S. C. A. 1391 as amended and to comment that it resulted in no change in the venue of unincorporated associations. In that case the Brotherhood, an unincorporated association, moved to dismiss a suit brought against it in the District of Columbia District Court alleging that it was an "inhabitant" or "resident" only of the district in which its principal place of business was located, Cleveland, Ohio. The United States Court of Appeals for the District of Columbia reversed the lower courts refusal t

grant the motion to dismiss. The new statute was enacted during the pendency of the suit and the Court in its much referred to footnote left no doubt but what the new statute was considered in making its decision, stating:

> "28 U.S.C. Sec. 112 (1946) is rephrased in 28 U.S.C. Sec. 1391(b), effective September 1, 1948 as follows: 'A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law'.
>
> "*The Revisor's Notes* to Sec. 1391 state: 'Word "reside" was substituted for "whereof he is an inhabitant" for clarity inasmuch as "inhabitant" and "resident" are synonymous. (See *Ex Parte Shaw*, 1892, 12 S. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; *Standard Stoker Co., Inc. v. Lower*, D. C., 1931, 46 F. 2d 678; *Edgewater Realty Co. v. Tennessee Coal, Iron & Railroad Co.*, D. C. 1943, 49 F. Supp. 807). Reference to "all plaintiffs" and "all defendants" were (sic) substituted for reference to "the plaintiff" and "the defendant", in view of many decisions holding that the singular terms were used in a collective sense. (See *Smith v. Lyon*, 1890, 10 S. Ct. 303, 133 U. S. 315, 33 L. Ed. 635; *Hope v. Jamieson*, 1897, 17 S. Ct. 596, 166 U. S. 395, 41 L. Ed. 1049; and *Fotzer v. Livermore*, D. C., 1926, 15 F. 2d 462)'.
>
> "We think that the rephrasing in 28 U. S. C. Sec. 1391 (b) (1948) of 28 U. S. C. Sec. 112 (1946) makes no substantive change in respect of venue of the United States Courts generally."

This view has been adhered to by district courts throughout the country, with the exception of the cited cases from the Southern District of New York. See *Salvant v. Louisville & N. R. Co.*, (W. D. Ky. 1949) 83 F. Supp. 391; *Griffin, et al v. Illinois Cent. R. C., et al*, (N. D. Ill. 1949) 88 F. Supp. 552; *McNutt, et al v. United Gas, Coke, and Chemical Workers of America, C.I.O., et al* (W. D. Ark. 1952) 108 F. Supp. 871; *Cherico v. Brotherhood of Railroad Trainmen*, (S.D.N.Y. 1958) 167 F. Supp. 635. It will be observed that the *Cherico* case is also from the Southern District of New York and is

subsequent to and held directly contra to the *Portsmouth Baseball Corp.* case, *supra*. At best, the Petitioners are left with authority supportive of their argument from a lone judicial district within which there is disagreement on the subject. As a matter of fact, the *Cherico* case contains some of the best discussion found on the effect of Section 1391 on the venue of unincorporated associations, the following quoted therefrom:

> "Under the clear words of the Statute, the venue as to BRT is improper if its 'residence' is at its principal place of business unless 28 U.S.C.A. 1391 (c) by its terms confined to corporations, is extended to unincorporated associations. . . . Title 28 U.S.C.A. 1391, passed in 1948, expressly provides that corporations for venue purposes, shall be considered residents of any district in which they do business. ('Residents' under 28 U.S.C.A. 1391 and 'inhabitants' under old 28 U.S.C.A. 112 are synonymous. See *Revisors' Note* to 28 U.S.C.A. 1391). In order to apply the provisions of subdivision (c) to unincorporated associations, it would be necessary to say that the revisors were unaware of the difference between corporations and unincorporated associations. This conclusion must be rejected and such rejection is supported by the weight of authority. (Citing cases)"

The Respondents respectfully submit that for the foregoing reasons the refusal to grant the Petition for Rehearing was correct.

QUESTION III

Has There Been any Waiver of Venue in this Case by the Respondents?

Similar to the attempt of the Petitioners to invoke for the first time a new issue by way of their Petition for Rehearing in the Fourth Circuit Court of Appeals, the Petitioners now seek to pursue still another issue before the United States Supreme Court in their Petition for Certiorari. The Respondents again point to the fact that this was an appeal from an interlocutory decree of the United States District Court for the

Western District of South Carolina, which decree would not normally be appealable. However, under 28 U.S.C.A. Section 1292(b) an application for appeal of this ruling was made and allowed, with the question certified to the Court of Appeals for the Fourth Circuit being whether or not 28 U.S.C.A. Section 1391(c) applied to plaintiff corporations as well as defendant corporations. The Respondents respectfully submit that the only issue certified for determination by the Court of Appeals involved the applicability of Section 1391(c) and that the Petitioners are in no position to deviate therefrom.

Furthermore, the Respondents submit that this new issue could by no means require this Court to grant the Petition for Certiorari for the reason that to benefit from their argument as to a waiver of venue, the Petitioners must first prevail under the basic and only real question involved. If Section 1391(c) does not permit a plaintiff corporation to bring suit in any district wherein it is engaged in business activities, how then could the Petitioners avail themselves of any waiver of venue by Messrs. Black & Veatch, residents of Missouri, so as to be entitled to institute suit in the Western District of South Carolina?

The Petitioners base this argument of an alleged waiver upon *Neirbo Co. v. Bethlehem Ship Building Corp.*, 308 U. S. 165, 60 S. Ct. 153 (1939), which held that a *corporation*, by qualifying to do business in a state and consenting to be sued in its Courts, had likewise consented to be sued in the federal courts therein. They further quote from *Knott Corp. v. Furman*, (4th C.C.A. 1947) 163 F. 2d 199, which further dealt with a *corporation* consenting to be sued in all courts within a state by there engaging in business. The passage in 1948 of 28 U.S.C.A. Section 1391(c) has codified the holding of *Neirbo* and the cases following that view. However, the statute clearly does not apply to partnerships nor did the decisions in those cases which have been superseded by the enactment of the statute.

The case of *Olberding v. Illinois Central Ry.*, 346 U. S. 338, 74 S. Ct. 83 (1953) is four square against the Petitioners in their efforts to institute suit against the Respondents in the

Western District of South Carolina. In that case, in discussing the limitations of Section 1391 on venue, Mr. Justice Frankfurter stated:

> "The plaintiff, by bringing the suit in a district other than that authorized by the statute, relinquished his right to object to the venue. But unless the defendant has also consented to be sued in that district, he has a right to invoke the protection which Congress has afforded him. The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."

In the instant case there has been no waiver by the Respondents of any legal right pertaining to venue. They have through their partnership engaged in certain business activities in South Carolina, but have not been required to nor in any wise agreed not to invoke any protective statutes afforded to them by the Congress. In order to sustain the position of the Petitioners it would be necessary to acknowledge that any individual, partnership or other person or business entity, regardless of residence, identity or principal place of business, waives the guaranteed right of venue and becomes amenable to suit in any jurisdiction wherein he may engage in any business activity. This view is completely unacceptable and incapable of support under the provisions of Section 1391. There exists no authority to the effect that merely doing business by an individual, partnership or unincorporated association constitutes a waiver of venue or that by so doing business within a certain jurisdiction, that jurisdiction becomes the place of residence.

The Petitioners have listed five factual points which they contend imply a waiver of venue in the present case. These are totally without merit unless there is in the first instance venue under the terms and provisions of 28 U.S.C.A. Section 1391(c). That was the issue determined by the United States Court of Appeals for the Fourth Circuit and unless such decision was in error, the present argument has no application.

CONCLUSION

For the reasons hereinabove set forth, the Respondents do not believe there are present any questions requiring a review by this Honorable Court of this case and therefore respectfully pray that the Petition for Certiorari be denied.

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